

SERVED: September 21, 1998

NTSB Order No. EA-4703

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of September, 1998

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15055
v.)	
)	
KENNETH L. WRONKE,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent, who represents himself in this proceeding, has appealed from the oral initial decision and order issued by Administrative Law Judge William R. Mullins on March 24, 1998, at the conclusion of an evidentiary hearing.¹ In that decision, the law judge affirmed, in part, an order of the Administrator that suspended respondent's commercial airman certificate on

¹An excerpt from the hearing transcript containing the initial decision is attached.

allegations of violations of Sections 91.119(d), 91.203(a)(1), 91.203(a)(2), and 91.13(a) of the Federal Aviation Regulations (FAR), 14 CFR Part 91, as a result of two alleged incidents of low flight in a helicopter. The Administrator also charged that the helicopter that was operated during the alleged low flights was not properly registered with the Federal Aviation Administration (FAA). The law judge found that one of the incidents of low flight was not established by a preponderance of the evidence. He sustained the remaining allegations, and reduced the sanction from a 180-day suspension to a 90-day suspension of respondent's airman certificate. The Administrator has filed a brief in reply to respondent's appeal, urging the Board to affirm the law judge's initial decision.² We deny the appeal.

Respondent raises numerous procedural and factual arguments. He asserts that he was denied due process and a fair hearing based on the following: he claims that the law judge should have dismissed the complaint as stale because the hearing was held more than 30 months after the incidents; that the Administrator withheld discovery and concealed the identity of an eyewitness; that FAA Inspector Ballard falsified his statements; that respondent's "flight data records" disprove the allegations of low flight; that these proceedings constitute double jeopardy as to the September 11, 1995 incident, which he claims was

²The Administrator withdrew her previously filed notice of appeal.

adjudicated in a state court proceeding relating to his divorce; that the aircraft was current in its inspections and carried temporary registration, thus constituting "effective" registration; that the flights alleged were over undeveloped terrain and in support of wildlife resources; that the Administrator obstructed justice; and that the law judge's findings of fact are erroneous. None of these claims have merit.

According to the record, on September 3, 1995, FAA Inspector Ballard was driving on Interstate Highway 74, one-half mile west of Ogden, Illinois, when he observed a helicopter pass over the highway at a very low altitude.³ Inspector Ballard testified that several drivers braked so that they could look up at the helicopter, causing the highway traffic, which was substantial at the time, to slow down, and thereby creating a hazard. Inspector Ballard testified that he recognized the helicopter because of its unusual markings, which he had observed in his previous official dealings with respondent concerning this very aircraft. On at least three occasions, Ballard explained, he had attempted to get respondent to properly register this aircraft with the FAA. According to the individual who was listed as the registered owner, respondent had purchased the aircraft from him in 1990.

Inspector Ballard testified that immediately after observing this low flight operation, he drove to respondent's airport and

³This incident occurred on a weekend, when he was not on official duty.

confronted him.⁴ Respondent was waiting for the blades to stop so he could tie down the aircraft. According to Ballard, respondent was wearing a gray jumpsuit, similar to the clothing worn by the pilot of the low-flying helicopter. When Ballard told respondent that he had just observed his low flight, Ballard testified that respondent replied, "oh." Ballard also testified that respondent admitted that the aircraft was still not properly registered.

Respondent's ex-wife testified that on September 11, 1995, respondent again operated this helicopter at low altitudes, this time over her home and her neighborhood. She claims that respondent then followed their children's school bus at a low altitude, and that he operated the aircraft at low altitudes over the school and other buildings. She called the local police authorities, who arrested respondent for violating a protective order.⁵ Respondent's ex-wife offered photographs she claims to have taken that day, which purport to show the low altitude of the aircraft. No other eyewitnesses were presented by the Administrator.⁶

In his answer to the Administrator's complaint, respondent denied both low flight incidents. He testified at the hearing

⁴Respondent is the private owner of a public airport located in Homer, Illinois.

⁵Respondent was incarcerated shortly thereafter, as a result of a contempt of court order related to his divorce. The hearing was held within the confines of the jail.

⁶The law judge found these photographs were inadequate to prove the low flight.

that he is a veterinarian, and at the time of these flights he was flying over various ponds and lagoons in the region, as a part of a voluntary effort to preserve local fish and wildlife. He denies that he was following the path of the school bus on September 11, 1995, and he claims that he has never operated his aircraft so as to create a hazard to people and property on the ground. As to the September 3rd incident, respondent claims that he first departed his airport right around the time of the alleged low flight, suggesting that Inspector Ballard's identification of the aircraft was erroneous. In support of these claims, respondent read into the record portions of some type of a flight log that he apparently wrote in and which he kept onboard the helicopter. Finally, respondent claims that he transferred ownership of the subject helicopter to his mother as collateral for a loan, and that it was she who had failed to send in the registration forms to the FAA. Respondent offered no documents into evidence.

As the Administrator notes in her reply brief, the Board's Rules of Practice provide for dismissal of a complaint where an airman fails to receive notice of the Administrator's allegations within 6 months of the incidents underlying the complaint. In this case, respondent makes no claim that he failed to receive timely notice of proposed certificate action.⁷ His argument is based on the length of time it took to schedule a hearing. As

⁷Nothing in the record shows the date a notice of proposed certificate action was mailed to respondent, although the Administrator claims it was timely.

the law judge notes, much of that delay was caused by respondent. As to claims of "double jeopardy" regarding the September 11, 1995 incident, since the allegation of low flight on that date was not sustained by the law judge, the issue is moot. As to respondent's claims that he held a temporary registration for the aircraft, such evidence was not entered into the record and we are therefore unable to consider whether it could have served as a defense. Respondent's arguments concerning witness credibility, the weight given to his "flight data records," and his assertions regarding the type of terrain he operated over, essentially amount to an attack on the law judge's findings of fact. We have reviewed the entire record in this matter, and we find that the law judge's findings are amply supported by a preponderance of the evidence. Respondent offers us no persuasive reason to disturb those findings, which we adopt as our own.

Finally, we will address the claim concerning the Administrator's failure to identify the person who apparently accompanied Inspector Ballard on September 3, 1995. When this issue was raised during the course of the hearing, it was discovered that respondent had failed to serve a copy of his witness request on the Administrator's counsel. The law judge instructed respondent to raise this issue when he cross-examined Inspector Ballard. Respondent failed to do so. In our view, any claim of prejudice could have been remedied at that point in the proceeding. Any error caused by the Administrator's failure to

identify this potential witness was therefore waived by respondent.⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge's initial decision and order, are affirmed; and
3. The 90-day suspension of respondent's commercial airman certificate shall begin 30 days after the service date of this opinion and order.⁹

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁸Respondent also asserts prejudice because the Administrator failed to produce certain documents that he had requested in discovery. We agree with the Administrator that this claim is unavailing, since these documents were actually prepared by respondent.

⁹For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).